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Tort Law - Duty to Warn - Psychiatrist's Duty to Warn Third Parties of Dangerous Patients

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TORT LAW—DUTY TO WARN—PSYCHIATRIST'S DUTY TO WARN THIRD PARTIES OF DANGEROUS PATIENTS—The Superior Court of New Jersey has held that a psychiatrist, upon a determination that his patient may be potentially dangerous, has a duty to warn a third party who may be harmed by the patient.

McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

In July, 1975, Lee Morgenstein murdered Kimberly McIntosh.[1] At the time of the murder, Morgenstein had been receiving weekly psychiatric treatment from Dr. Michael Milano for approximately two years.[2] In the course of their therapeutic relationship, Dr. Milano had learned of Morgenstein's fantasies, his sexual experiences with the decedent, his jealousies of the decedent's other relationships, and his possession of a knife.[3] However, Dr. Milano denied that Morgenstein had ever expressed feelings of violence toward or an intent to kill the decedent.[4] After the murder of her daughter, the decedent's mother instituted a wrongful death action against Dr. Milano, alleging that he breached his duty to warn the decedent or her family of a potential danger to them.[5] The defendant sought summary judgment on the basis that he owed no duty to warn the decedent or her parents about the content of his confidential discussions with Morgenstein.[6]

1. Kimberly McIntosh had lived with her parents next door to the Morgenstein family. Prior to the fatal shooting, she had moved away from the family home. Morgenstein knew that she was expected to visit her parents, so he waited for her with a pistol that he kept hidden at home. Morgenstein then induced her to accompany him to a local park where he shot her in the back. McIntosh v. Milano, 168 N.J. Super. 466, 470-74, 403 A.2d 500, 502-04 (1979).

2. *Id.* at 470, 403 A.2d at 502. Morgenstein was fifteen when a school psychologist suggested that he receive psychiatric treatment and gave the names of certain therapists to Morgenstein's parents. *Id.* at 472, 403 A.2d at 503.

3. *Id.* at 472-73, 403 A.2d at 503. During the two years in which Morgenstein was receiving treatment, he related to the defendant fantasies of fear and heroism along with fantasies of overpowering others by threatening them with a knife. Morgenstein further revealed that he once fired a B.B. gun at either decedent's or her boyfriend's car when he was upset that she had a date with her boyfriend. Moreover, he brought to a therapy session a knife that he bought so that he could threaten people who attempted to frighten or intimidate him. *Id.* at 473, 403 A.2d at 503.

4. *Id.* at 473, 403 A.2d at 504.

5. *Id.* at 476, 403 A.2d at 505. The amended complaint of Peggy McIntosh, administratrix Ad Prosequendum of the decedent's estate, consisted of two counts. In the first count, plaintiff alleged that defendant breached his duty by negligently failing to warn decedent, her parents, or the police of Morgenstein's violent tendencies, anger, and intentions. In the second count, plaintiff alleged that defendant breached his duty in failing to consult or advise Dr. McIntosh, decedent's father and Morgenstein's medical physician, of Morgenstein's mental condition. Plaintiff's Amended Complaint at 1-8.

6. 168 N.J. Super. at 470, 403 A.2d at 502.

The New Jersey Superior Court followed a decision of the California Supreme Court[7] imposing a duty on therapists to warn third parties and denied the defendant's motion for summary judgment.[8] The court stated that whether a duty exists for a therapist to warn third parties about a potential danger is a question of fairness necessitating a weighing of the relationship of the parties, the nature of the risk, and the public interest in imposing the duty.[9] Recognizing that therapists may not be capable of a completely accurate prediction of patient dangerousness,[10] the court noted that the therapist would be held only to the standard for a therapist in the particular field in the particular community. Moreover, the court determined that an entire class of professionals should not be excused from a duty unless, when called upon to make a medical judgment, the therapists admitted their medical uncertainty in both predicting patient dangerousness and determining the effectiveness or necessity of treatment.[11]

The court discussed the general rule that an individual will not be held to a duty to control the conduct of a third person in order to protect another unless a special relation exists between the actor and the third person or between the actor and the other.[12] The court noted that section 314 of the *Restatement (Second) of Torts* acknowledges that, absent a special relationship, a person's realization that his action is necessary to protect another does not itself impose a duty to take such action. However, the court pointed out that section 314 indicates that it should be read together with other sections. Citing the comment to

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7. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (wrongful death action against university, psychotherapists employed by the university, and campus police to recover for the murder of plaintiff's daughter by a psychiatric patient).

8. 168 N.J. Super. at 496, 403 A.2d at 515. The court recognized that *Tarasoff* was nonbinding authority in New Jersey. 168 N.J. Super. at 471, 403 A.2d at 502.

9. 168 N.J. Super. at 483, 403 A.2d at 508.

10. *Id.* The court stated:

> Realistically, however, duty does partake of many of the characteristics of an abstract term as defined in standard dictionaries, and thus may be difficult or impossible to define in absolute and precise terms, even when applied to specific facts. Similarly, the terms "dangerous" or "dangerousness" have abstract qualities, as do such concepts as reasonableness, beauty, and so forth.

Id. at 481, 403 A.2d at 507-08 (footnote omitted).

11. *Id.* at 482, 403 A.2d at 508.

12. *Id.* at 483, 403 A.2d at 508-09. Section 315 of the *Restatement (Second) of Torts* states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965).

section 314, the court recognized that it appears inevitable that such extreme cases of morally outrageous and indefensible conduct will arise and cause further inroads upon the older rule.[13] The court also noted that section 314A lists four special relationships which give rise to a duty.[14] Although doctor-patient relationship is not listed in section 314A, the court stated that, in a caveat to the section, the Institute expressed no opinion as to whether other relations may impose a similar duty.[15] The court pointed out that the imposition of legal duties upon physicians is not new.[16]

Citing the duty imposed upon physicians to warn third persons about possible exposure to contagious diseases[17] and certain other conditions,[18] the court further noted New Jersey statutes imposing duties to disclose on persons including physicians.[19] Although it recognized that a relative certainty is present in diagnosis of physical illnesses as opposed to a psychiatric prediction of dangerousness, the court maintained that psychiatrists diagnose and treat without any clear indication of an inability to predict.[20]

Having set forth the existing law imposing various duties upon

13. 168 N.J. Super. at 484, 403 A.2d at 509.

14. *Id.* The four special relationships that give rise to a duty are: (1) a common carrier to its passengers; (2) an innkeeper to his guests; (3) a possessor of land to members of the public to whom he holds open his land; and (4) one who takes custody of another under circumstances which deprive the other of his normal opportunities for protection, to this other individual under custody. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

15. 168 N.J. Super. at 484, 403 A.2d at 509.

16. *Id.*

17. *Id.* N.J. STAT. ANN. § 26:4-15 (West 1964) provides in relevant part:

> Every physician shall, within 12 hours after his diagnosis that a person is ill or infected with a communicable disease or other disease required by any law of this State, the State Sanitary Code, or ordinance, to be reported, report such diagnosis and such related information as may be required by the State Department of Health. . . .

The physician's duty extends to those situations where he should have known of the infectious disease. *See* Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970) (if physician negligently failed to diagnose tuberculosis in father and child contracted disease from father, physician would have breached duty owed to child and his estate would be liable for child's injuries); Fosgate v. Corona, 66 N.J. 268, 330 A.2d 355 (1974) (doctor was liable for failing to diagnose tuberculosis in principal victim, which resulted in her hospitalization and infection of her daughter-in-law and grandchildren).

18. 168 N.J. Super. at 485 n.13, 403 A.2d at 509 n.13. The court recognized that a physician has a duty to report gunshot wounds to the chief of police and county prosecutor and to report epilepsy to the Division of Motor Vehicles. *Id.*

19. *Id.* at 485-86, 403 A.2d at 510. N.J. STAT. ANN. § 2A:97-2 (West 1969) (repealed. 1978) stated:

> Any person having knowledge of the actual commission within the jurisdiction of this state of arson, manslaughter, murder, or of any high misdemeanor, who conceals and does not, as soon as may be, disclose and make known the same to a judge, magistrate, prosecutor or police authority, is guilty of a misdemeanor.

20. 168 N.J. Super. at 485, 403 A.2d at 510.

physicians, the court revealed the policy considerations underlying its decision. It found the strongest public policy consideration to be the need to provide a remedy for a wrong.[21] The court noted that it should not dismiss a complaint merely because the issue is too complex or may provide a vehicle for a frivolous claim, for the policy of allowing liberal access of litigants to the courts for redress cannot totally prevent this. However, the court noted that it is for the plaintiff to establish the appropriate standard with regard to psychiatric diagnosis. There may be problems of proof and the defendant has an opportunity to present and refute evidence as to the appropriate standard of care.[22] The court suggested that the remedy lay in improvements in the competence of the court system, not elimination of causes of action.[23]

Summarizing its holdings, the court stated that a psychiatrist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient presents or may present a probability of danger to that person. The relationships which give rise to this duty may be that between the psychiatrist and his patient or the obligation a practitioner may have to protect the welfare of the community.[24]

The court then addressed the defendant's argument that because of a need for confidentiality in therapy, an imposition of a duty to warn would result in socially undesirable consequences to patients.[25] It emphasized that although a New Jersey statute[26] and the American Medical Association's Principles of Medical Ethics[27] recognize a physician-patient confidentiality privilege, the privilege is not absolute.[28] A pa-

21. *Id.* at 487, 403 A.2d at 510. *See* Lambert v. Brewster, 97 W. Va. 124, 138, 125 S.E. 244, 249 (1924).

22. 168 N.J. Super. at 487-89, 403 A.2d at 510-11.

23. *Id.* at 487, 403 A.2d at 510.

24. *Id.* at 489, 403 A.2d at 511-12.

25. *Id.* at 490, 403 A.2d at 512.

26. N.J. STAT. ANN. § 2A: 84A-22.2 (West 1976) provides in relevant part:

> Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication if he claims the privilege and the judge finds [certain factors to be present] . . . .

27. AMA, PRINCIPLES OF MEDICAL ETHICS § 9 (1957), *reprinted in* AMA, JUDICIAL COUNCIL OPINIONS AND REPORTS 57 (1966) states:

> A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiences he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

28. 168 N.J. Super. at 490, 403 A.2d at 512.

tient's right to confidentiality is limited by supervening societal interests.[29] Such a limitation is recognized by the medical profession itself.[30]

The court rejected as inconsistent the defendant's argument that the imposition of a duty would deter therapists from treating potentially violent patients in light of possible malpractice claims by third parties. In the court's view, because the defendant argued that psychiatrists could not accurately predict dangerousness, it was inconsistent to argue that the imposition of a duty to warn of dangerousness would force them to refuse treatment of dangerous patients. If a therapist were unable to predict dangerousness, the court reasoned, it would be impossible for him to weed out potentially dangerous patients.[31] The court noted that a psychiatric prediction of dangerousness is comparable to the judgments that doctors and professionals must regularly make under accepted rules of responsibility.[32] It further stated that in light of past judicial reliance on the ability of psychiatrists to predict dangerousness, an assertion now of an inability to predict would raise serious questions about the present commitment procedures.[33]

The court noted that whether or not a duty exists is a question of law. The court cannot determine legal relationships based only upon *ipse dixit* and assumptions that a certain course of action will follow without regard to medical or professional responsibility and ethical considerations, as well as appropriate legal consideration.[34]

The argument that the imposition of this duty would result in increased patient commitment[35] was also rejected by the court.[36] The

29. *Id. See* Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962).

30. 168 N.J. Super. at 491, 403 A.2d at 512. *See* AMA, PRINCIPLES OF MEDICAL ETHICS §§ 1, 3, 9 and preamble (1957), *reprinted in* AMA, JUDICIAL COUNCIL OPINIONS AND REPORTS (1966).

31. 168 N.J. Super. at 493, 403 A.2d at 514.

32. *Id.* at 494, 403 A.2d at 514 (quoting Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25).

33. 168 N.J. Super. at 494-95, 403 A.2d at 514. *See* Addington v. Texas, 441 U.S. 418 (1979) (due process demands a "clear and convincing" standard of proof of mental illness in civil commitment proceedings); O'Connor v. Donaldson, 422 U.S. 563 (1975) (an involuntary commitment in which a person is deprived of liberty must be based on a standard of dangerousness to self or others).

34. 168 N.J. Super. at 495, 403 A.2d at 514.

35. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 452, 551 P.2d 334, 354, 131 Cal. Rptr. 14, 34 (1976) (Clark, J., dissenting); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974) [hereinafter referred to as *Psychiatric Prediction of Dangerousness*]; Shah, *Dangerousness—A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCH. 224 (1978) [hereinafter referred to as *A Paradigm for Exploring Some Issues*]; Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976) [hereinafter referred to as *Suing Psychotherapists*].

36. 168 N.J. Super. at 496, 403 A.2d at 515 (1979).

court again noted the inconsistency of this argument with the defendant's earlier argument that psychiatrists are not able to accurately predict dangerousness.[37] Moreover, the court found a lack of reliable statistical support for such an argument.[38]

With its decision in *McIntosh*, New Jersey became only the second jurisdiction to impose upon a psychiatrist the duty to warn a third party of his patient's potential dangerousness.[39] This duty had also been imposed in 1976 by the California Supreme Court in *Tarasoff v. Regents of the University of California*.[40] Although the *McIntosh* court

37. *Id.*

38. *Id.*

39. Nebraska has become the third jurisdiction where this duty is imposed. In Lipari v. Sears, Roebuck & Co., No. 77-0-458 (D. Neb. July 17, 1980), a patient who was released by the Veterans Administration after receiving psychiatric care purchased a shotgun at Sears and killed a third party. The third party's survivor sued Sears for selling a gun to one whom it knew or should have known had been adjudged mentally defective or had been committed to a mental institution. Sears, in turn, filed a third-party complaint against the United States alleging that the United States may be liable to Sears under the doctrines of contribution and indemnity.

Two other recent cases illustrate the differences between circumstances that warrant imposition of the duty to warn and those that do not. In *Thompson v. County of Alameda*, 614 P.2d 728, 167 Cal. Rptr. 70 (1980), the parents of a five-year-old boy sued the county for wrongful death, alleging that the county had acted recklessly in releasing from custody a juvenile delinquent who was known to have dangerous and violent propensities, and failing to give adequate warning. The court distinguished *Tarasoff* in two ways. While in *Tarasoff* a special relationship existed between the defendant therapists and the patient, which might support imposition of affirmative duties for the benefit of third persons, the defendant county in *Thompson* bore no special and continuous relationship with the plaintiffs. Moreover, unlike *Tarasoff*, in *Thompson* the decedent was not a forseeable or readily identifiable target.

In *Shaw v. Glickman*, 45 Md. App. 718, 415 A.2d 625 (1980), a husband discovered his wife in bed with the plaintiff and shot the plaintiff. The plaintiff brought an action against the "psychiatric team" that had been providing psychiatric care to the husband, the wife, and the plaintiff. The plaintiff alleged that the team had been negligent in failing to warn the plaintiff of the husband's unstable and violent condition and the danger presented to the plaintiff. The court found the *Tarasoff* rationale to be inapposite in that the intent to kill or injure had not been disclosed to the defendants. The court further held that had the husband revealed a plan to shoot the plaintiff, any disclosure by a member of the psychiatric team would have been a breach of confidence.

40. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). *See* note 7 and accompanying text *supra*. Commentaries written in response to *Tarasoff* are in agreement that the decision does not adequately balance the factors that must be considered in deciding whether to impose a duty. Griffith & Griffith, *Duty to Third Parties, Dangerousness, and the Right to Refuse Treatment: Problematic Concepts for Psychiatrist and Lawyer*, 14 CAL. W.L. REV. 241 (1978) [hereinafter referred to as *Duty to Third Parties*]; Comment, *Tarasoff v. Regents of the University of California—Risk Allocation in Mental Health Care: Whether to Treat the Patient or his Victim*, 1975 UTAH L. REV. 553; Note, *Tarasoff v. Regents of the University of California: The Duty to Warn: Common Law & Statutory Problems for California Psychotherapists*, 14 CAL. W.L. REV. 153 (1978) [hereinafter referred to as *Common Law & Statutory Problems*];

recognized that *Tarasoff* was not binding authority,[41] the similarity of the two opinions and the court's extensive reference to *Tarasoff* indicate the strong influence of *Tarasoff* on the *McIntosh* court. In both cases, to impose on psychiatrists a duty to warn, the courts relied upon the *Restatement (Second) of Torts*[42] and case law that imposed upon the physician a duty to warn of possible exposure to contagious diseases.[43]

A critical analysis of *McIntosh* reveals that the court's reliance upon sections 314 and 315 of the *Restatement* is misplaced. Section 314 of the *Restatement* sets forth the general rule that even if a person realizes or should realize that action on his part is necessary for another's aid or protection, he is under no duty to take such action.[44] Section 314A lists special relationships which constitute exceptions to the general rule.[45] For example, a common carrier is under a duty to its passengers to take reasonable action to protect them against unreasonable risk of physical harm, to give them first aid after it knows or has reason to know they are ill, and to care for them until they can be cared for by others; an innkeeper is under a similar duty to his guests; a possessor of land is under a similar duty to members of the public whom he invites onto his land; and one who takes custody of another under circumstances so as to deprive the other of his normal opportunities for protection is under a similar duty to the other.[46] Section 315 states that there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the actor and another which gives to the other a right to protection.[47] Sections 316 through 320 list the relations between the actor and a third person which require the actor to

Note, *Imposing a Duty to Warn on Psychiatrists—A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283 (1977) [hereinafter referred to as *A Judicial Threat*]; Note, *Tarasoff v. Regents of the University of California: The Psychotherapist's Peril*, 37 U. PITT. L. REV. 155 (1975) [hereinafter referred to as *The Psychotherapist's Peril*]; *Suing Psychotherapists*, note 35 *supra*.

41. 168 N.J. Super. at 471, 403 A.2d at 502.

42. The *Tarasoff* court relied upon §§ 314 and 315 of the *Restatement (Second) of Torts*. 17 Cal. 3d at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23 (1976). These same sections of the *Restatement (Second) of Torts* were also relied upon by the *McIntosh* court. 168 N.J. Super. at 483-84, 403 A.2d at 508-09. *See* notes 12 & 14 and accompanying text *supra*.

43. The *Tarasoff* court cited Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970). 17 Cal. 3d at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24. The *McIntosh* court also cited *Hofmann*. 168 N.J. Super. at 485, 403 A.2d at 509.

44. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

45. *Id.* § 314A.

46. *Id.*

control the third person's conduct: the duty of a parent to control the conduct of his child;[48] the duty of a master to control the conduct of his servant;[49] the duty of a possessor of land or chattels to control the conduct of a licensee;[50] the duty of those in charge of a person having dangerous propensities to control the conduct of that individual;[51] and the duty of a person having custody of another to control the conduct of third persons.[52]

Reliance upon section 315 to impose upon a psychiatrist a duty to warn is misplaced because that section addresses the existence of a duty to *control* conduct of a third party which is different from a duty to *warn* the potential victim. Additionally, inherent in each of the special relationships enumerated in sections 316 through 320 as imposing a duty to control is an element of controlling, taking charge, or having custody[53]—all absent from the psychiatrist-outpatient relationship. A psychiatrist who works with his patient for one hour each week cannot control what his patient does during the remainder of the week[54] and, therefore, should have no duty to warn.

To the extent that section 314 deals with a duty to protect rather than a duty to control, it is applicable to the *McIntosh* case. However, to determine whether a duty does exist, one must look to section 314A which lists special relationships from which a duty will arise. It is here that the court's reliance is inappropriate. Section 314A lists relationships between the actor and the person to be protected which impose a duty upon the actor to protect the other.[55] However, the *McIntosh* court found a duty to warn based upon a special relationship between the psychiatrist and his patient.[56] Section 314A is not authority for establishing such a source of duty. To apply section 314A, a relationship between the psychiatrist and potential victim must be found.[57]

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48. *Id.* § 316.
49. *Id.* § 317.
50. *Id.* § 318.
51. *Id.* § 319.
52. *Id.* § 320.
53. The five relationships enumerated in these sections include:
(1) the duty of a parent to control the conduct of his child; (2) the duty of a master to control the conduct of his servant; (3) the duty of a possessor of land or chattels to control the conduct of a licensee; (4) the duty of those in charge of persons having dangerous propensities to control the conduct of those individuals; and (5) the duty of a person having custody of another to control the conduct of third persons.
RESTATEMENT (SECOND) OF TORTS §§ 316-320 (1965).
54. *See Duty to Third Parties*, note 40 *supra; Suing Psychotherapists, supra* note 35, at 366.
55. *See* RESTATEMENT (SECOND) OF TORTS § 315, Comment c (1965).
56. 168 N.J. Super. at 489, 403 A.2d at 511-12.
57. The argument could be made that the psychiatrist has a duty to protect his patient from committing offenses with unpleasant consequences such as imprisonment. The argument might be valid if the patient were the plaintiff, but in *McIntosh*, it is the parents of the potential victim, not the patient, who are seeking relief.

The court found this relationship in the obligation that a practitioner may have to protect the welfare of the community.[58] However, to impose upon the psychiatrist a duty to warn because of the general relationship he has with the community by virtue of his status is tenuous. In support of this relationship, the *McIntosh* court analogized the relationship between the psychiatrist and the community to the obligation of a physician to warn third persons of infectious or contagious diseases.[59] This analogy does not work.

In relying on case law which imposed a duty on physicians to warn third persons of contagious diseases,[60] the court implicitly presumes that mental illnesses and physical diseases are analogous. The prediction of dangerousness is quite different from diagnosing a known physical disease.[61] In order to analogize a physician's warning of exposure to contagious diseases to a psychiatrist's warning of his patient's dangerousness, the court asserts a critical underlying premise that psychiatrists are as capable of predicting dangerousness[62] as physicians are capable of diagnosing diseases. Whether psychiatrists are capable of accurate prediction has been questioned.[63] Therefore, the court's implicit assertions are important, for if there is a valid distinction between mental and physical illnesses, the court's reliance on the line of cases dealing with contagious diseases is faulty.

Although the court's use of this line of cases to support an imposition of a duty may be misplaced, its application of the traditional negligence standard of care to define the imposed duty is not. By holding that the psychiatrist will be held only to the standard of a therapist in that particular community,[64] the court provides a safeguard for the psychiatrist. If he is indeed unable to accurately

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58. 168 N.J. Super. at 489-90, 403 A.2d at 512.

59. *Id.*

60. *Id.* at 484-85, 403 A.2d at 509 (citing Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970)). *See* Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953).

61. The court recognized the distinction between the two illnesses: "There is, to be sure, a relative certainty and uniformity present in a diagnosis of most physical illnesses, conditions and injuries as opposed to a psychiatric prediction of dangerousness based on symptoms and historical performance." 168 N.J. Super. at 485, 403 A.2d at 509-10.

62. 168 N.J. Super. at 494, 403 A.2d at 514. The court stated: "Perhaps the *Tarasoff II* decision does assume or accept that the psychiatrist has some ability (or at least has some special training) to detect and predict dangerousness." *Id.*

63. *See* Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974); *Common Law & Statutory Problems*, note 40 *supra*; *A Judicial Threat*, note 40 *supra*; *Psychiatric Prediction of Dangerousness*, note 35 *supra*; *A Paradigm for Exploring Some Issues*, note 35 *supra*.

64. 168 N.J. Super. at 482, 403 A.2d at 508.

predict dangerousness in a given situation, and this is the standard for a psychiatrist in the community, he will not be liable. This does not, however, free the psychiatrist from a burdensome defense. If the community standard confirms an inability to predict, the result will be that no duty will be imposed on the psychiatrist, yet he will have perfunctorily proceeded to court.

Although problems with imposition of a duty to warn exist, the court must decide whether or not this duty to warn should exist *as a matter of law*. It is not for the court to decide when a psychiatrist is capable of accurately predicting dangerousness. A decision by the court not to impose the duty because of an inability to accurately predict would have implied that psychiatrists can *never* predict dangerousness accurately. Such a position would preclude plaintiffs from ever having the opportunity to prove that a psychiatrist could have predicted dangerousness. The court's decision imposes the duty as a matter of law and leaves for the jury the issue of ability to accurately predict.

The prudence of this judicial expansion of a duty to warn is debatable.[65] The resolution requires a balancing of competing harms. If a duty is not imposed, potential plaintiffs will be precluded from seeking a remedy, but if a duty is imposed, psychiatrists will be burdened with defending such suits. A critical question underlying this balance is whether, and under what circumstances, a psychiatrist can predict dangerousness. Thus, the courts in determining whether a duty exists, are faced with an initial factual question. By imposing the duty to warn, the *McIntosh* court has decided the issue as a matter of law and has left the factual question for the jury. Although the result may be supportable on this ground, the court's reliance on the *Restatement (Second) of Torts* and case law imposing upon physicians a duty to warn of contagious diseases is questionable.

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65. A California court has narrowly interpreted the original mandate of Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In Bellah v. Greenson, 73 Cal. App. 3d 893, 141 Cal. Rptr. 92 (1977), the parents of a daughter who committed suicide filed suit against the psychiatrist who had treated the decedent, alleging that the defendant failed to warn others of decedent's mental state. The California Court of Appeals held that there was no duty to warn where the risk was of self-inflicted harm, even though there was a duty to warn where the risk was of a violent assault upon a third party. Thus, in refusing to expand the duty to warn, a lower California court has limited the application of its supreme court's mandate set forth in *Tarasoff*.